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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(San Joaquin)

NENITA GUAIO, Plaintiff and Appellant, v. DAMERON HOSPITAL et al., Defendants and Respondents.	C081755 (Super. Ct. No. STK-CV-UWT-2013-0005893, 39201300298078CUWTSTK)

Appellant Nenita Guiao brings this employment discrimination case against her former employer Dameron Hospital Association (Dameron) and former supervisor Doreen Alvarez (collectively defendants), alleging that she was unlawfully discriminated against and harassed based on her race, national origin, and age at the hands of Alvarez, and that Dameron failed to take action to prevent it in violation of the California Fair

Employment and Housing Act (the FEHA) (Gov. Code, § 12900 et seq.).[1] Guiao claims that she was forced to resign due to the intolerable working conditions created by Alvarez and was retaliated against after complaining to the human resources (HR) director that she was being harassed by Alvarez. The complaint alleges causes of action for discrimination (§ 12940, subd. (a); against Dameron), harassment (§ 12940, subd. (j); against Dameron and Alvarez), retaliation (§ 12940, subd. (f); against Dameron), failure to take all reasonable steps necessary to prevent discrimination and harassment (§ 12940, subd. (k); against Dameron), and injunctive relief (Code Civ. Proc., § 526; against Dameron). The complaint also seeks punitive damages.

Defendants moved for summary judgment, or in the alternative, summary adjudication. The trial court granted defendants' motion for summary judgment. The trial court found that Guiao (1) failed to make out a prima facie case for discrimination because she was not terminated and her resignation was not a constructive termination, (2) failed to make out a prima facie case for harassment because she could not show that the alleged harassment was severe or pervasive, and (3) failed to make out a prima facie case of retaliation because she could not establish a causal link between her complaint about Alvarez's conduct and any adverse employment action. The trial court further found that Guiao could not establish her claim for injunctive relief because she did not want to return to work at Dameron, and that her cause of action for failing to take steps necessary to prevent discrimination and harassment and request for punitive damages could not survive summary judgment because they were derivative of her discrimination and harassment causes of action.

Guiao appeals, contending that the trial court erred in granting summary judgment on each of her causes of action, except her claim for injunctive relief, because defendants

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[1] Undesignated statutory references are to the Government Code.

"did not establish that [she] could not prove her case at trial," and even if they did, she established triable issues of material fact. She also asserts that the trial court abused its discretion by "disregard[ing] the testimony of Jackie Magnusson [*sic*], Bassey Duke, and [Guiao]."[2] We shall conclude that Guiao has not shown that the trial court abused its discretion in sustaining defendants' objections to her evidence, and that summary judgment was properly entered in defendants' favor. Accordingly, we shall affirm the judgment.[3]

FACTUAL AND PROCEDURAL BACKGROUND

The following facts are taken from the evidence set forth in the papers filed in connection with the summary judgment motion, except that to which objections were properly made and sustained. (*Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1037.) Consistent with the applicable standard of review, we summarize the evidence in the light most favorable to Guiao, the party opposing summary judgment, resolving any doubts concerning the evidence in her favor. (*Ibid*.)

A. Guiao's Employment at Dameron Before Alvarez Became Her Supervisor

Guiao, a registered nurse, worked at Dameron for nearly nine years. She is Filipina and was over 40 years old when she resigned in July 2012.

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[2] Contrary to Guiao's assertion, the complaint does not contain a cause of action for wrongful termination in violation of public policy, and the trial court neither considered nor ruled on any such claim. Thus, we shall not address Guiao's claims related thereto.

[3] This is one of six appeals pending before this court by former Dameron nursing employees who reported directly to Alvarez, alleging that they were discriminated against in violation of the FEHA. (See *Kabba v. Dameron Hospital Assn.*, C081090; *Ortiz v. Dameron Hospital Assn.*, C081091; *Galvan v. Dameron Hospital Assn.*, C081092; *Arimboanga v. Dameron Hospital Assn.*, C081249; and *Duke v. Dameron Hospital Assn.*, C081251.)

At all relevant times herein, Guiao worked as a unit coordinator in the telemetry department. Patients in the telemetry department require heart monitoring, and nurses in the telemetry department must be able to read electrocardiogram (EKG) monitors. Failure to quickly read and recognize irregular rhythms on an EKG monitor can lead to unwanted patient outcomes, including death. At her deposition, Guiao acknowledged that she was required to know how to read EKG monitors and teach other nurses in the department how to do so as part of her job as a unit coordinator.

In January 2011, Guiao was written-up by the then-director of the telemetry department Roman Roxas for failing to: ensure that all EKG strips are interpreted; "huddle" at the beginning of every shift; do an assigned task; return director/manager e-mails and phone calls; and participate in team building events. As a result, she was placed on a performance improvement plan.

In April 2011, Roxas completed Guiao's annual performance evaluation, which required Roxas to rate Guiao's performance in a number of areas on a scale of 1 to 4. Guiao's overall performance rating was 2.86, which equated to "meets requirements." Under the heading "Employee Strength" Roxas wrote, "Nenita has been a unit coordinator for many years and has shown improvement." Under the heading "Opportunity" Roxas wrote, "In this time of accountability, Nenita needs to perform as a TRUE Unit Coordinator, supporting Management and its endeavors. Modeling leader behavior and fairness with her staff. Participating in Team Building activities and mentoring and training those who need support."

On May 4, 2011, Guiao was written-up by Roxas for failing to respond to e-mails and complete an assigned task and placed on a performance improvement plan.

On May 11, 2011, Guiao was written-up by Roxas for failing to communicate to nurses the need for patients/family to complete a survey and placed on a performance improvement plan.

In December 2011, she was written-up by Linda Lewis, who replaced Roxas as director of the telemetry department, for a "policy breach," i.e., documenting an inappropriate order, and ordered to review the relevant hospital policy.

B. Alvarez Becomes Guiao's Supervisor

In March 2012, Alvarez became the director of the telemetry department, replacing Linda Lewis. At that time, there were eight unit coordinators in that department, four "white," three Filipino, and one "African-American." Guiao was one of the three Filipino unit coordinators. Guiao worked under Alvarez for approximately three months, until Guiao resigned on July 27, 2012. Guiao, who worked nights, "very seldom" saw Alvarez, who worked during the day.

At her first unit coordinator meeting after becoming the director of the telemetry department, Alvarez entered the room, threw some papers in front of the three unit coordinators who were present, and said, "I already know all of you. You're all bad. I just don't know why you are still here. You should just sign the paper and leave and resign because . . . you guys are all bad." There were two unit coordinators at the meeting in addition to Guiao, one was "black," and the other was "white."

At another meeting, Alvarez presented a document summarizing various mistakes made by unit coordinators in written evaluations they prepared and told them that they did "not even know English," "how to do evaluations," or how to spell.

On "numerous occasions," Guiao heard Alvarez say that "the Filipino workers can 'just quit and leave' if they did not like [her] management." Alvarez also told Guiao that if she could not do her job, she "should either 'step up, step down or step out.' "

On March 27, 2012, Guiao was written-up by Alvarez and issued a warning for "insubordination" for responding to an e-mail from Guiao's clinical manager in an "unprofessional" manner and failing to complete a plan of action as requested.

On June 1, 2012, Guiao was written-up by Alvarez for failing to maintain her basic life support (BLS) certification and suspended until her certification was renewed.

Guiao was required to have a BLS certification as part of her job and could not work without it. Because maintaining active BLS certification is a state mandate, nurses at Dameron who allowed their BLS certification to lapse were automatically suspended. At her deposition, Guiao acknowledged that it was her responsibility to keep her BLS certification up to date.[4]

On July 10, 2012, Guiao arrived at what she thought was a regular unit coordinator meeting only to learn that she and the other unit coordinators were going to be given their annual EKG exam. Each year Guiao and the other nurses in the telemetry department were required to take an EKG exam. Unlike past years, Guiao did not receive prior notice of the exam or any educational materials on its subject matter. When she arrived at the meeting, the other unit coordinators were reviewing something, and when she asked what they were doing, they responded, "Oh, you don't know? We have a test today." After the exam, Alvarez told Guiao that she and the other night shift unit coordinator failed the exam and accused Guiao and another unit coordinator of cheating.

On July 24, 2012, at the next unit coordinator meeting, Alvarez showed a video about cheating, and "[e]veryone was looking at [Guiao]." Alvarez told the unit coordinators that her son would know better than to cheat on a test. Following the meeting, Bassey Duke and Karen Shurb, clinical managers who reported to Alvarez, questioned Guiao about the exam and accused her of cheating. Shurb then told Guiao that she had to retake the exam or lose her job. Guiao did so and failed.

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[4] In the past, Dameron's education department notified Guiao that her certification was about to expire. Guiao did not receive any such notice prior to her certification expiring in 2012. She did not know whether any other nurses were notified by the education department that their certifications were about to expire in 2012.

C. Dameron Decides to Terminate Guiao

On July 25, 2012, the day after Guiao failed the EKG exam for the second time, Alvarez asked Janine Hawkins, chief nursing officer, Denise Hair, director of clinical projects, and others whether there were any other positions available at Dameron for Guiao and was told there were none. A day or two later, Alvarez recommended to Hawkins that Guiao be terminated for incompetence based on her failure to pass the EKG exam, and Hawkins agreed. Alvarez did not consider any other form of discipline because being able to identify a heart rhythm "is her primary job. She's a resource for all the other nurses. We have new grads [working during] the night shift. She needs to be able to identify a rhythm at all times. This is a patient-safety issue."

D. Guiao Resigns

On July 27, 2012, Guiao was called to HR by Maria Junez, the HR director, for a meeting with Junez and Alvarez. The purpose of the meeting was to terminate Guiao's employment. Guiao had a feeling that was the case and prepared a letter of resignation. Guiao arrived early for the meeting, and while she and Junez were waiting for Alvarez to arrive, she complained to Junez that she was being harassed by Alvarez. Junez responded that the claim would have to be investigated.

When Alvarez arrived at the meeting, she was holding Guiao's termination papers and last paycheck. Before Alvarez could tell her that she was terminated, Guiao submitted her letter of resignation, which stated, "Recent circumstances incompatible with my personal values require that I change my employment."

E. Alvarez's Comments to Duke

Alvarez repeatedly complained to Duke about the Filipino unit coordinators. She told Duke that the Filipino unit coordinators "were too old and had been there too long." She talked about "them not being able to speak English, not being smart enough, being

dumb and being too old and not the face of U.C. Davis," with whom Dameron hoped to merge.[5] She constantly said that they did not know how to speak or write English. She also stated, "These old Filipinos are making way too much money." At some point, Alvarez gave Duke the names of several unit coordinators she wanted to get rid of, including Guiao, because they "were dumb," "didn't speak English," "didn't represent the face of U.C. Davis," "ma[d]e too much money," and "[w]ere old."

When Duke suggested providing a review course to the unit coordinators prior to the EKG exam, Alvarez responded, "Those Filipinos, they are old, they are too dumb. They don't have any brains to learn it anyway. Just let them take it because they're going to flunk so I can get rid of them." Following the first EKG exam, Alvarez told Duke that some of the unit coordinators "will not pass," and specifically identified three Filipino unit coordinators whom she believed "didn't have enough brains" and were "too dumb" to pass. Guiao was not among those identified. During a subsequent conversation, Alvarez told Duke that she believed that Guiao and another unit coordinator who is "black" had cheated on the exam. Alvarez explained that Guiao and the other unit coordinators' results were similar.

Before the unit coordinators who failed the first exam were retested, Duke approached Alvarez about providing training on how to read an EKG, and Alvarez told him, "[I]f you want to train, go ahead. But you're wasting your time. They're too dumb to understand." When Alvarez learned that Duke had told the unit coordinators about a website that they could visit to help them prepare, she said that he "should stop helping

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[5] Throughout her opening brief, Guiao refers to an impending merger between Dameron and Stanford University. Guiao cites to Duke's deposition transcript in support of this "fact"; however, the only merger he mentions is one between Dameron and UC Davis.

them because by helping them, . . . [he's] defeating the purpose of what she wants to do, which is to terminate them."

DISCUSSION

A motion for summary judgment must be granted if the submitted papers show there is no triable issue as to any material fact and that the moving party is entitled to judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c).) The moving party initially bears the burden of making a "prima facie showing of the nonexistence of any genuine issue of material fact." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 845.) "A prima facie showing is one that is sufficient to support the position of the party in question." (*Id.* at p. 851.) As applicable here, a defendant moving for summary judgment can meet its burden of showing that a cause of action has no merit by showing that one or more elements of the cause of action cannot be established. (Code Civ. Proc., § 437c, subd. (p)(2).) Once the defendant has met its burden, the burden shifts to the plaintiff to show that a triable issue of one or more material facts exists as to the cause of action. (*Ibid*.)

On appeal following summary judgment, the matter is reviewed de novo. (*Jimenez v. County of Los Angeles* (2005) 130 Cal.App.4th 133, 140.) "We exercise our independent judgment as to the legal effect of the undisputed facts [citation] and must affirm on any ground supported by the record." (*Ibid*.) First, we identify the issues raised by the pleadings, since it is those allegations to which the motion must respond. Second, we determine whether the moving party's showing has established facts negating the opponent's claims and justifying a judgment in the moving party's favor. When a summary judgment motion prima facie justifies a judgment, the final step is to determine whether the opposition demonstrates the existence of a triable, material issue of fact. (*Barclay v. Jesse M. Lange Distributor, Inc.* (2005) 129 Cal.App.4th 281, 290.)

I

Guiao Has Failed to Show That the Trial Court Abused Its Discretion In Sustaining Defendants' Objections to Her Evidence

Before we determine whether summary judgment was properly granted, we pause to consider Guiao's claim that the trial court abused its discretion in sustaining defendants' objections to her evidence as Guiao seeks to rely on the excluded evidence to show that the trial court erred in granting summary judgment in defendants' favor.

The trial court sustained 36 of defendants' 50 objections to Guiao's evidence submitted in opposition to the motion for summary judgment, namely the declarations of Jackie L. Magnuson and Guiao, and Duke's deposition transcript.[6] Guiao contends that "it was an abuse of discretion for the trial court to completely disregard the testimony of Magnuson, Duke, and plaintiff." According to Guiao, their testimony "was appropriate, with a proper foundation, and admissible."

Contrary to Guiao's assertion, the trial court did not "completely disregard" Guiao's, Magnuson's, and Duke's testimony; rather, it sustained defendants' objections to specific portions thereof. As discussed in more detail below, Guiao does not address defendants' individual objections or the specific testimony that is the subject thereof; instead, she makes general and conclusory assertions as to why she believes that each witnesses' testimony is admissible. As we shall explain, Guiao has failed to show any abuse of discretion.

" 'Pursuant to the weight of authority, appellate courts review a trial court's rulings on evidentiary objections in summary judgment proceedings for abuse of discretion. [Citations.]' [Citation.] The party challenging a trial court's evidentiary

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[6] The trial court overruled defendants' objections to Alvarez's deposition testimony and sustained one of defendants' objections to Denise Hair's deposition, but Guiao does not challenge that ruling on appeal.

ruling has the 'burden to establish such an abuse, which we will find only if the trial court's order exceeds the bounds of reason. [Citation.] "Where a trial court has discretionary power to decide an issue, an appellate court is not authorized to substitute its judgment of the correct result for the decision of the trial court." [Citation.] We will only interfere with the lower court's judgment if appellant can show that under the evidence offered, " 'no judge could reasonably have made the order that he did.' " ' [Citation.]" (*Duarte v. Pacific Specialty Ins. Co.* (2017) 13 Cal.App.5th 45, 52, fn. omitted.)

A. Declaration of Jackie L. Magnuson

Magnuson was retained by Guiao to (1) "review [Guiao's] personnel file and her performance as a unit coordinator at Dameron, as well as Dameron Hospital's employment policies and procedures," and (2) "evaluate the EKG strip test that was administered to Ms. Guiao on July 10, 2012 and July 24, 2012 with respect to its propriety in the notice, preparation time, materials and assistance given to the test takers prior to the test, as well as the substance, grading and results of the test, and the remedial steps offered to Guiao as part of her retesting."

Magnuson is a "Board Certified Emergency Registered Nurse," who has held various nursing positions throughout northern California since 1997. From June 2014 to June 2015, she worked as the "Director of Nursing Administration & Patient Experience" at Mercy San Juan Medical Center in Carmichael, and from June 2012 to June 2014, she worked as the "Assistant Nurse Manager-Tele-1/Stroke Unit" at Kaiser Permanente in Santa Clara. Prior to that, she held various nursing positions in emergency departments at hospitals in Watsonville, San Francisco, and San Jose. She also has taught advanced cardiac life support (ACLS) and BLS classes to nurses and has 18 years of experience reading EKG strips.

The trial court sustained all but one of defendants' objections to Magnuson's declaration, concluding that Magnuson's opinions "are incompetent and lack foundation

because she does not explain the factual basis (education and experience) for her familiarity with proper 'protocols and practices' regarding hospital employee testing, issuance of discipline and performance improvement plans, and licensing requirements." In addition, the court found that Guiao's failure to submit five of the six items that Magnuson stated she reviewed in her declaration (Guiao's personnel file, Dameron's policies and procedures, Denise Hair's deposition, Doreen Alvarez's deposition, and Janine Hawkins's deposition) "render[ed] her opinions that rely on those materials incompetent." Finally, the court determined that "to the extent [Magnuson's] testimony second-guesses the employer's business judgment, it is improper."

Guiao argues on appeal that "Magnuson laid a proper foundation for the special knowledge, skill, and experience sufficient to qualify her as an expert in hospital operations and testing of registered nurses in a telemetry unit." According to Guiao, "[t]he special knowledge, skill, and experience was set forth in the body of Magnuson's declaration, as well as in the Curriculum Vitae ('CV') appended thereto." Guiao, however, fails to point to any statements in the body of Magnuson's declaration or curriculum vitae (CV) that establish any special knowledge, skill, and experience in either hospital operations or testing.

"A person is qualified to testify as an expert if he [or she] has special knowledge, skill, experience, training, or education sufficient to qualify him [or her] as an expert on the subject to which his [or her] testimony relates. Against the objection of a party, such special knowledge, skill, experience, training, or education must be shown before the witness may testify as an expert." (Evid. Code, § 720, subd. (a).)

In her declaration, Magnuson states: "I am . . . familiar with the proper protocols and practices to be utilized in hospitals in the Central Valley of California, including, but not limited to San Joaquin County, regarding testing of employees in order to provide proper notice, preparation time, study materials, assistance to the test takers and the substance of the tests to be administered for Unit Coordinators with respect to reading

heart rhythms on EKG strips. I also am familiar with the proper protocols, procedures and practices with respect to the issuance of discipline and performance improvement plans for unit coordinators and other nursing personnel for hospitals in the Central Valley of California. Finally, I am familiar with the licensing requirements in the State of California and with the agencies or departments that are qualified to create, administer, grade and review tests and to use such tests to issue licenses, specialty designations and other categories within the nursing field in California." Magnuson, however, does not identify the source of her familiarity with the various protocols and practices, licensing requirements, or agencies and departments upon which her opinions are based, except to state that "[m]y qualifications, background and experience are set forth in my curriculum vitae, which is attached as Exhibit 'A.' "

According to Magnuson's CV, she has never worked in San Joaquin County and spent just one year working at a single hospital in the Central Valley (Carmichael). Thus, there is no foundation for her statement that she is familiar with "the proper protocols and practices to be utilized in hospitals in . . . San Joaquin County, regarding testing of employees . . . with respect to reading heart rhythms on EKG strips" and little, if any, foundation for her statement that she is familiar with "the proper protocols and practices to be utilized in hospitals in the Central Valley of California." The source of Magnuson's familiarity with licensing requirements and agencies or departments qualified to create, administer, grade and review tests likewise is not clear from her CV.

The trial court did not abuse its discretion in concluding that Magnuson's opinions lacked foundation and in sustaining defendants' objections to her declaration on that basis.[7]

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[7] Guiao fails to address the other two grounds cited by the trial court in sustaining defendants' objections—Guiao's failure to submit five of the six items that Magnuson

B. Guiao's Declaration

The trial court sustained, in whole or in part, 19 of defendants' 24 objections to Guiao's declaration. Defendants objected to various portions of Guiao's declaration on foundational, relevance, and hearsay grounds. They also argued that certain portions were vague, ambiguous, misleading, speculative, amounted to improper legal conclusions, and contained improper opinion testimony. The trial court did not offer any explanation for its rulings on defendants' objections to Guiao's declaration.

On appeal, Guiao contends that the trial court abused its discretion when it "disregarded portions of the testimony in her declaration that recount the manner in which [she] was discriminated against and harassed by Alvarez." She does not, however, identify the testimony to which she is referring, much less offer any argument specific thereto. Rather, she argues in a general and conclusory fashion that "all evidence that has a tendency to prove or disprove a dispute[d] fact is admissible pursuant to Evidence Code section 210," her testimony regarding "all the ways in which she was discriminated by Alvarez" had a sufficient foundation pursuant to Evidence Code section 702 because it happened to her, and "pursuant to Evidence Code section 800 the plaintiff is entitled to state a lay opinion in a conclusory fashion so long as it is based on their own perception of the facts."

Contrary to Guiao's assertion, all evidence that has a tendency to prove or disprove a disputed fact is not admissible. Evidence Code section 210, cited by Guiao,

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stated she reviewed and Magnuson second-guessing Dameron's business judgment. Thus, even if we had concluded that the trial court erred in concluding that Magnuson's opinions lacked foundation, we nevertheless would conclude that Guiao failed to meet her burden of showing that the trial court abused its discretion in sustaining defendants' objections to Magnuson's declaration testimony.

simply defines "relevant evidence."[8] While it is true that only relevant evidence is admissible (Evid. Code, § 350), it does not follow that all relevant evidence is admissible (Evid. Code, § 351 ["Except as otherwise provided by statute, all relevant evidence is admissible"]). "The Evidence Code contains a number of provisions that exclude relevant evidence either for reasons of public policy or because the evidence is too unreliable to be presented to the trier of fact. See, *e.g.*, Evidence Code § 352 (cumulative, unduly prejudicial, etc. evidence), §§ 900-1070 (privileges), §§ 1100-1156 (extrinsic policies), § 1200 (hearsay). Other codes also contain provisions that may in some cases result in the exclusion of relevant evidence. [Citations.]" (Cal. Law Revision Com. com., 29B pt. 1A West's Ann. Evid. Code (2011 ed.) foll. § 351, p. 257.) Thus, even assuming for argument's sake that the testimony in question is relevant, it does not follow that it is admissible.

While we agree with Guiao as a general matter that she would have personal knowledge of events she witnessed or statements she overheard, such personal knowledge must be shown before a witness may testify concerning the matter. (Evid. Code, § 702.) Guiao's declaration, however, is replete with statements she did not hear and events she did not witness. For example, in her declaration, Guiao states that she "discovered that Ms. Alvarez previously stated to another employee that [she] 'hated all these Filipinos' and that there are too many of them (Filipinos) working at Dameron Hospital." She also states that she knew that Alvarez "fire[d] many of the other Filipino nurses within a span of a few months after [she] was forced to resign" because "the other nurses who Ms. Alvarez fired informed me of the same."

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8 Evidence Code section 210 provides: " 'Relevant evidence' means evidence, including evidence relevant to the credibility of a witness or hearsay declarant, having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action."

Finally, while a lay witness is entitled to state an opinion that is "[r]ationally based on the perception of the witness" and "[h]elpful to a clear understanding of his testimony" (Evid. Code, § 800), Guiao's declaration testimony is not so limited. For example, in her declaration, Guiao states, "[Ms. Alvarez] did everything in her power to harass, and create a hostile work environment for me and these other nurses, by making false accusations against me and creating such unreasonable expectations that they would either quit or be terminated, no matter how good their performance was or how hard they tried to work with Ms. Alvarez." Guiao's statement amounts to an improper lay opinion because it constitutes a legal conclusion. The manner in which the law should apply to particular facts is a legal question and is not subject to expert, much less lay, opinion. (See, e.g., *Summers v. A.L. Gilbert Co.* (1999) 69 Cal.App.4th 1155, 1179.) Moreover, to the extent her testimony extends to "these other nurses," it is vague and beyond Guiao's personal knowledge.

Guiao has not met her burden of showing that the trial court abused its discretion in sustaining defendants' objections to her declaration.

C. Duke's Deposition

Guiao erroneously asserts that "[t]he trial court sustained [defendants'] objection to the entirety of deposition testimony of Bassey Duke" on the ground that Guiao was not aware of Alvarez's comments to Duke until after she resigned. The trial court sustained two of defendants' 10 objections (objection Nos. 40 and 44) to Duke's deposition testimony, only one of which was directed at statements made by Alvarez to Duke.

The trial court sustained defendants' objection No. 40 to Duke's testimony that he and Karen Shurb had a conversation during which Shurb told him about "her experience with [Alvarez]" and "about the comments she's made about Filipinos," and Duke told Shurb about comments Alvarez made to him. The challenged testimony does not include any actual comments made by Alvarez to either Duke or Shurb.

The trial court also sustained defendants' objection No. 44 to Duke's testimony that Alvarez provided him with the names of people she wanted to get rid of, including Guiao. Defendants objected to this testimony on hearsay and relevance grounds. In ruling on defendants' objections, the trial court stated: "Objections 40 and 44—Sustained. All others overruled. The statements attributed to Alvarez don't come in for their truth, but to show her state of mind. [Citation.] Because plaintiff herself did not personally hear these statements, they do not support plaintiff's cause of action for harassment." We interpret the trial court's ruling as sustaining defendants' objections on relevance grounds as to the harassment cause of action. As set forth *post* in our discussion of Guiao's harassment cause of action, Alvarez's statements to Duke are not relevant to the issue of whether Guiao was subjected to severe or pervasive harassment because Guiao was not aware of those statements until after she resigned. Were Guiao able to show that she was subjected to severe or pervasive harassment, Alvarez's statements to Duke would be relevant to show that the harassment was based on Guiao's protected status. We conclude below, however, that Guiao has failed to establish a triable issue of material fact on the issue of whether she was subjected to severe or pervasive harassment.

II

Summary Judgment Was Properly Granted on Guiao's Discrimination Cause of Action

Under the FEHA, it is unlawful for an employer, because of a protected classification, to discriminate against an employee "in compensation or in terms, conditions, or privileges of employment." (§ 12940, subd. (a).) To state a prima facie case for discrimination in violation of the FEHA, a plaintiff must establish that (1) she was a member of a protected class, (2) she was performing competently in the position she held, (3) she suffered an adverse employment action, and (4) some other circumstance suggests discriminatory motive. (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 355.) Once an employee establishes a prima facie case, a presumption of

discrimination arises, and the employer is required to offer a legitimate, nondiscriminatory reason for the adverse employment action. (*Id.* at pp. 355-356.) If the employer produces a legitimate, nondiscriminatory reason for the adverse employment action, the presumption of discrimination drops out of the picture, and the burden shifts back to the employee "to attack the employer's proffered reasons as pretexts for discrimination, or to offer any other evidence of discriminatory motive." (*Id*. at p. 356.)

This framework is modified in the summary judgment context: " '[T]he employer, as the moving party, has the initial burden to present admissible evidence showing either that one or more elements of plaintiff's prima facie case is lacking or that the adverse employment action was based upon legitimate, nondiscriminatory factors.' " (*Serri v. Santa Clara University* (2014) 226 Cal.App.4th 830, 861.) "If the employer meets its initial burden, the burden shifts to the employee to 'demonstrate a triable issue by producing substantial evidence that the employer's stated reasons were untrue or pretextual, or that the employer acted with a discriminatory *animus*, such that a reasonable trier of fact could conclude that the employer engaged in intentional discrimination or other unlawful action.' " (*Ibid.*)

Here, the trial court concluded that Guiao could not establish the third element of her prima facie case (adverse employment action) because she was not terminated, and her resignation did not amount to a constructive discharge. On appeal, Guiao contends that the trial court erroneously "disregarded [her] testimony that she was fired by Alvarez or HR" and "concluded that [she] left employment voluntarily." Defendants respond that Guiao cannot establish the second element of her prima facie case (that she was performing competently in her job), and in any event, the trial court properly determined that she cannot establish she suffered an adverse action. Guiao did not file a reply brief and therefore does not address defendants' argument that she was not performing competently in her job on appeal.

It is well settled that on appeal following summary judgment, the trial court's reasoning is irrelevant, and the matter is reviewed on appeal de novo. (*Jimenez v. County of Los Angeles, supra,* 130 Cal.App.4th at p. 140.) "We exercise our independent judgment as to the legal effect of the undisputed facts [citation] and must affirm on any ground supported by the record." (*Ibid.*) As we shall explain, we agree with defendants that Guiao failed to present facts sufficient to establish that she was performing competently in her position and shall affirm the judgment as to the discrimination cause of action on that basis.

In the trial court, defendants presented evidence that Guiao twice failed the annual EKG competency exam, which tested a skill that Guiao acknowledged was essential to her job. This evidence was sufficient to shift the burden to Guiao to establish a triable issue of material fact as to whether she was performing competently in her job.

Guiao responded in pertinent part as follows: (1) her performance evaluations prior to Alvarez becoming her supervisor showed that she performed her job competently; (2) her competence was never questioned before the EKG exam administered by Alvarez; (3) Alvarez made racist, anti-Filipino statements; (4) unlike the "younger, non-Filipino nurses," Guiao was not given proper notice of the exam or its substance, adequate time to prepare, or study materials; (5) "no one at Dameron Hospital was certified or qualified to give the type of test that they gave as a 'pop test' " and the persons who created and administered it were not qualified to do so; and (6) the EKG exam "did not test the primary function of [Guiao's] job as a Unit Coordinator." Guiao cited her own declaration, the declaration of Magnuson, and the depositions of Alvarez and Duke in support of her assertions. As we shall explain, many of the claims listed above are not supported by admissible evidence, and those that are do not create a triable issue of material fact as to whether Guiao was competently performing her job.

Guiao cited to Magnuson's declaration in support of her claims that those who created and administered the EKG exam were not qualified to do so, and the exam itself

did not test a "primary function" of her job.[9] As previously discussed, the trial court ruled that Magnuson's opinions lacked foundation, and Guiao has failed to show that the trial court abused its discretion in sustaining defendants' objections thereto. Thus, Guiao's claims related to the creation, administration, and substance of the EKG exam are not supported by admissible evidence.

Guiao cited to her own declaration in support of her claim that she was treated differently than "younger, non-Filipino nurses" with respect to the EKG exam in that she was not given proper notice for the exam or its substance, adequate time to prepare, or study materials. In the admissible portion of her declaration, Guiao states that unlike in past years, she did not receive any prior notice of the EKG exam and did not learn of the exam until immediately before it was administered. Guiao also states that Dameron's past practice "was to make staff aware of an upcoming test and to provide education materials on the subject matter of the test." The trial court sustained defendants' objection to Guiao's testimony that "there were other Unit Coordinators who were made aware of the test by Ms. Alvarez," and as previously discussed Guiao failed to show that the trial court abused its discretion in doing so. Thus, there is no evidence to support Guiao's claim that she was treated differently than other unit coordinators (young, non-Filipino, or otherwise) with respect to the EKG exam. Moreover, the fact that she did not

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9 Contrary to California Rules of Court, rule 3.1350(f)(2), Guiao failed to reference the page and line numbers of any of the declarations or depositions upon which she relied, leaving opposing counsel, the trial court, and now this court to search the record in support of her claims. She repeats this error throughout her opening brief, either failing to cite to the record or citing to entire declarations and deposition transcripts. (Cal. Rules of Court, rule 8.204(a)(1)(C).) An argument that is not supported with the necessary citations to the record may be deemed waived. (*Nwosu v. Uba* (2004) 122 Cal.App.4th 1229, 1246.) Despite Guiao's failure to comply with these and other mandatory rules (see fn. 11, *post*), we shall endeavor to consider the arguments in her opening brief. As previously mentioned, she did not file a reply brief on appeal.

receive prior notice of the exam or study materials does not create a triable issue of material fact as to whether she was performing competently in her job. It is undisputed that patients in the telemetry department where Guiao worked require heart monitoring, and that nurses in that department must be able to read EKG monitors. Indeed, at her deposition, Guiao acknowledged that she was required to know how to read EKG monitors and teach other nurses in the department how to do so as part of her job as a unit coordinator.[10] Nevertheless, she twice failed to pass an exam that tested her competency to do so and has failed to present any admissible evidence that would support a finding that her failure to pass either exam was based on anything other than her incompetence.

Guiao cited to her own declaration and Alvarez's deposition testimony in support of her claims that her performance evaluations showed that she performed her job competently and her competence was never questioned before the EKG exam

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10 At her deposition, Guiao testified as follows:

"Q. Do you recall following 2008 that the hospital wanted their staff to be more aware about EKG—or being able to read EKG strips?

"A. That is normal for a telemetry floor that you need to do that.

"Q. Is that part of your normal job duties?

"A. Like doing the EKG. It's in front of me.

"Q. And its part of your job to monitor the EKG machine?

"A. All of us.

"Q. And as the unit coordinator, I assume it will be important for you to know EKG—

"A. It is.

"Q. And would you be responsible for teaching the other nurses in the unit if necessary?

"A. It is.

"Q. In your own words, can you tell me what it is that an EKG machine does or monitor does? [¶] . . . [¶]

"A. EKG is the electrical impulses of the heart. So when you work on the telemetry, we—the patients are always monitored, heart monitor. You have to know how the heart is doing on that side. And mostly, if you work over there, just look at it, you know it already because [you're] used it."

administered by Alvarez. The trial court sustained defendants' objections to the relevant portions of Guiao's declaration, and as previously discussed Guiao has failed to establish that the trial court abused its discretion in doing so. In any event, Guiao's bare assertions in her declaration are inconsistent with the documentary evidence and her own deposition testimony. While Guiao's most recent performance evaluation rated her overall performance a 2.86, placing her in the "meets requirements" category, the evaluation was prepared months before she was given her annual EKG exam. In the intervening months leading up to the annual EKG exam, Guiao was disciplined five times, twice by Alvarez and three times by Alvarez's predecessors. Moreover, at her deposition, Alvarez testified that she had assumed that Guiao was competent based on Guiao's last performance evaluation and current ACLS, but her opinion changed after Guiao failed the second EKG exam. At that point, Alvarez concluded that Guiao was not competent.

Finally, Guiao cites to Duke's deposition testimony in support of her claim that Alvarez made racist, anti-Filipino statements. Duke testified that Alvarez regularly complained to him about the Filipino unit coordinators, telling him that they "were too old and had been there too long," could not speak English, and were not smart. At one point, she gave Duke the names of several unit coordinators she wanted to get rid of, including Guiao, because they "were dumb," "didn't speak English," "didn't represent the face of U.C. Davis," "ma[d]e too much money," and "were old." While these statements are outrageous and demonstrate a clear animus toward Filipinos, such comments have no bearing on Guiao's competence. It is undisputed that the EKG exam was administered to all the unit coordinators, and Guiao has failed to produce any evidence that would support a finding that she was treated differently than any other unit coordinator with respect to the administration or scoring of the exam.

In sum, Guiao has failed to present evidence sufficient to allow a reasonable fact finder to conclude that she was performing competently in her job at the time she

resigned. Accordingly, summary judgment was properly granted on Guiao's discrimination cause of action.

III

Summary Judgment Was Properly Granted on Guiao's Harassment Cause of Action

Under the FEHA, it is unlawful "[f]or an employer . . . or any other person, because of race, . . . national origin, . . . [or] age . . . to harass an employee . . . ." (§ 12940, subd. (j)(1).) To establish a prima facie case of a hostile work environment, Guiao must show that (1) she is a member of a protected class; (2) she was subjected to unwelcome harassment; (3) the harassment was based on her protected status; (4) the harassment unreasonably interfered with her work performance by creating an intimidating, hostile, or offensive work environment; and (5) defendants are liable for the harassment. (*Thompson v. City of Monrovia* (2010) 186 Cal.App.4th 860, 876.)

Here, the trial court ruled that Guiao could not establish the fourth element of her harassment cause of action (the harassment unreasonably interfered with her work performance) because "any harassment was insufficiently severe or pervasive to alter [her] employment conditions."

Guiao asserts on appeal that "[t]he undisputed testimony of Duke and plaintiff established that [defendants] engaged in race and national origin discrimination which created a hostile work environment, as [defendants] favored non-Filipino employees, by showing an animus in the work place against the Filipino employees and by providing disparate treatment to Filipino employees."[11] Defendants respond that Guiao cannot meet the "severity" standard required by case law for establishing a hostile work

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11 Contrary to California Rules of Court, rule 8.204(a)(1)(B), the argument section of Guiao's opening brief does not contain a heading for her harassment cause of action. Instead, she addresses both her discrimination and harassment causes of action under the heading "National Origin/Race Discrimination."

environment claim because "[t]he only instance Guiao personally witnessed that involved alleged harassment was when Alvarez threw papers at her and two other nurses," or the "pervasiveness" standard because Alvarez supervised Guiao for only three or four months and Guiao seldom saw Alvarez.

"[A]n employee claiming harassment based upon a hostile work environment must demonstrate that the conduct complained of was severe enough or sufficiently pervasive to alter the conditions of employment and create a work environment that qualifies as hostile or abusive to employees because of their [protected status]." (*Miller v. Department of Corrections* (2005) 36 Cal.4th 446, 462.) "[H]arassment creates a hostile, offensive, oppressive, or intimidating work environment and deprives victims of their statutory right to work in a place free of discrimination when the harassing conduct sufficiently offends, humiliates, distresses, or intrudes upon its victim, so as to disrupt the victim's emotional tranquility in the workplace, affect the victim's ability to perform the job as usual, or otherwise interfere with and undermine the victim's personal sense of well-being." (§ 12923, subd. (a); see also *Harris v. Forklift Systems, Inc.* (1993) 510 U.S. 17, 26 (conc. opn. of Ginsburg, J.).) "A single incident of harassing conduct is sufficient to create a triable issue regarding the existence of a hostile work environment if the harassing conduct has unreasonably interfered with the plaintiff's work performance or created an intimidating, hostile, or offensive working environment." (§ 12923, subd. (b).) "The harassment must satisfy an objective and a subjective standard. ' "[T]he objective severity of harassment should be judged from the perspective of a reasonable person in the plaintiff's position, considering 'all the circumstances.' . . . " ' (*Miller v. Department of Corrections, supra,* 36 Cal.4th at p. 462.) And, subjectively, an employee must perceive the work environment to be hostile. [Citation.] Put another way, '[t]he plaintiff must prove that the defendant's conduct would have interfered with a reasonable employee's work performance and would have seriously affected the psychological well-

being of a reasonable employee and that [she] was actually offended.' [Citation.]" (*Hope v. California Youth Authority* (2005) 134 Cal.App.4th 577, 588.)

In the trial court, defendants presented evidence that Guiao (1) was never demoted, transferred or denied a raise or promotion to which she was entitled, and her schedule was never changed during the time Alvarez was her supervisor, and (2) had little interaction with Alvarez because Alvarez worked days and Guiao worked nights. This evidence was sufficient to shift the burden to Guiao to establish a triable issue of material fact as to whether she was subjected to severe or pervasive harassment. (Code Civ. Proc., § 437c, subd. (p)(2).)

As a preliminary matter, Alvarez's statements to Duke are not relevant to the issue of whether Guiao was subjected to severe or pervasive harassment because Guiao was not aware of those statements until after she resigned. (See *Beyda v. City of Los Angeles* (1998) 65 Cal.App.4th 511, 519 ["If . . . the plaintiff neither witnesses the . . . incidents nor knows that they occurred, those incidents cannot affect his or her perception of the hostility of the work environment"].)

During the three or four months that Guiao worked under Alvarez, Alvarez: (1) threw papers at Guiao and two other unit coordinators, one of whom was "black" and the other "white," and said, "You're all bad. I just don't know why you are still here. You should just sign the paper and leave and resign . . . because . . . you guys are all bad"; (2) told the unit coordinators that they did not "even know English," did not "know how to do evaluations," and did not "even know how to spell" when discussing mistakes in performance evaluations prepared by the unit coordinators; (3) repeatedly stated that "the Filipino workers can 'just quit and leave' if they did not like the management of Ms. Alvarez"; (4) told Guiao that if she could not do her job, she "should either 'step up, step down or step out' "; (5) issued Guiao a written warning for responding to an e-mail from her clinical manager in an unprofessional manner (using all caps) and failing to complete a plan of action as requested; (6) suspended Guiao for failing to maintain her

BLS certification; (7) failed to give Guiao prior notice of the annual EKG exam or provide her with any review materials; and (8) directed Duke and Shurb to accuse Guiao of cheating and then insist that she retake the exam "right then."

The conduct witnessed by Guiao is not sufficiently severe to support a harassment cause of action. It does not show that the work environment was more hostile for one group than another. With one exception, none of the statements attributed to Alvarez mentioned race, national origin, or age. The one statement that referenced race/national origin—"the Filipino workers can 'just quit and leave' if they did not like [Alvarez's] management"—while potentially offensive, is not so severe as to interfere with a reasonable person's work performance. Alvarez's statement that the unit coordinators "did not even know English," was made during a discussion of mistakes the unit coordinators had made in drafting performance evaluations. That statement, like much of the challenged conduct, was made during a critique of Guiao's and the other unit coordinators' job performance. But harassment does not include " 'commonly necessary personnel management actions such as hiring and firing, job or project assignments, . . . promotion or demotion, performance evaluations, . . . deciding who will be laid off, and the like.' " (*Serri v. Santa Clara University, supra,* 226 Cal.App.4th at p. 870.) These are " 'an inherent and unavoidable part of the supervisory function. Without making personnel decisions, a supervisory employee simply cannot perform his or her job duties.' " (*Id.* at pp. 869-870.) As our Supreme Court explained in *Reno v. Baird* (1998) 18 Cal.4th 640, harassment is a type of conduct outside the scope of a supervisor's necessary job performance. (*Id*. at pp. 645-646.)

A reasonable trier of fact could not find, based on Guiao's factual showing, that the conduct complained of was severe enough to alter the conditions of employment and create a work environment that qualifies as hostile or abusive to Guiao because of her race, national origin, or age.

IV

Summary Judgment Was Properly Granted on Guiao's Failure to Take All Reasonable Steps Necessary to Prevent Discrimination and Harassment Cause of Action

Under the FEHA, it is unlawful for an employer "to fail to take all reasonable steps necessary to prevent discrimination and harassment from occurring." (§ 12940, subd. (k).) No such action lies, however, if no harassment or discrimination has occurred. (See *Trujillo v. North County Transit Dist.* (1998) 63 Cal.App.4th 280, 289 ["Employers should not be held liable to employees for failure to take necessary steps to prevent such conduct, except where the actions took place and were not prevented"]; see also Cal. Code Regs., tit. 2, § 11023, subd. (a)(2).) As detailed above, summary judgment was properly entered as to Guiao's causes of action for discrimination and harassment. Accordingly, summary judgment was properly entered on her cause of action for failure to take all reasonable steps necessary to prevent the same.

V

Summary Judgment Was Properly Granted on Guiao's Retaliation Cause of Action

The FEHA protects an employee against retaliation if the employee "has opposed any practices forbidden under this part . . . ." (§ 12940, subd. (h).) "[I]n order to establish a prima facie case of retaliation under the FEHA, a plaintiff must show (1) he or she engaged in a 'protected activity,' (2) the employer subjected the employee to an adverse employment action, and (3) a causal link existed between the protected activity and the employer's action. [Citations.] Once an employee establishes a prima facie case, the employer is required to offer a legitimate, nonretaliatory reason for the adverse employment action. [Citation.] If the employer produces a legitimate reason for the adverse employment action, the presumption of retaliation ' " 'drops out of the picture,' " ' and the burden shifts back to the employee to prove intentional retaliation." (*Yanowitz v. L'Oreal USA, Inc., supra,* 36 Cal.4th at p. 1042.)

The trial court appears to have assumed that Guiao engaged in a protected activity by complaining to Junez that she was being harassed by Alvarez but concluded that

Guiao did not suffer an adverse employment action as a result of her complaint because she resigned moments later. Guiao fails to point to any evidence in her opening brief that would support a finding that she suffered an adverse action after engaging in a protected activity. Most notably, she fails to identify a single adverse action that occurred after she complained. Summary judgment was properly entered on her retaliation cause of action.[12]

DISPOSITION

The judgment is affirmed. Defendants shall recover their costs on appeal. (Cal. Rules of Court, rule 8.278(a)(1), (2).)

/s/
BLEASE, Acting P. J.

We concur:

/s/
ROBIE, J.

/s/
DUARTE, J.

[12] Because none of Guiao's causes of action survive, summary judgement was properly entered as to her request for punitive damages as well.